Supreme Court, U.S.
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No. 91-1430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TEXACO INC.,
Petitioner,

v.

DIANA L. MASON, Individually and as Administrator of the Estate of Otis W. Mason, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Was the jury's punitive damages award of $25,000,000 constitutionally defective because the award was subject only to limited post-trial review for "excessiveness" under a "shock the conscience" test, instead of the rigorous post-trial review of objective factors approved in *Haslip*?

2. Did Plaintiff's failure to cross-appeal the adverse jury verdict on her punitive damages claim in the first trial preclude her from relitigating her claim for punitive damages in the second trial?

RULE 29.1 STATEMENT

The statement required by Rule 29.1 was included in Petitioner's petition for certiorari.

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1. The first ground asserted by Respondent Diana L. Mason ("Mason") is that "Petitioner [Texaco] failed to present its due process arguments in a timely manner, as required by consistently applied federal practice." Brief in opposition at 5. Although this is the first ground put forward in Mason's "Summary of Argument," it is nowhere again mentioned in her argument.

In her Statement of the Case, however, Mason states that, after the second jury verdict, "Texaco then brought a Motion for Judgment Notwithstanding the Verdict or New Trial wherein it raised for the first time during this litigation the issue of the constitutionality of the punitive damage award." Brief in opposition at 3 (note omitted). It would have been impossible, of course, for Texaco to challenge the punitive damage award on *any* ground be-

fore the second jury returned its verdict. The motion for JNOV or a new trial was the first opportunity for Texaco to challenge the punitive damages award after the verdict, and, as Mason concedes, Texaco directly challenged the constitutionality of that award under the Due Process Clause in the motion. Moreover, Texaco argued its constitutional challenge in the Tenth Circuit, and in its decision that court addressed the due process issues and analyzed this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). App. 26a; 948 F.2d at 1559.

Mason's reliance on *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988), Brief in opposition at 3 n.1, is misplaced. This Court in *Bankers Life* declined to reach a federal constitutional challenge to a punitive damages award that the petitioner had not specifically raised in the Mississippi courts. Here Texaco fully briefed and argued its due process challenge in both of the courts below, and thus the constitutional question here was preserved for this Court's review.

2. Mason's position on the conflict among the circuit courts is inconsistent. On the one hand, she states that the circuit courts have "offer[ed] a variety of interpretations and solutions to the issues addressed by this Court in *Haslip*," but on the other hand she states that "the circuit courts have displayed uncommon uniformity in applying *Haslip*." Brief in opposition at 8, 10. Her very short discussion of the conflict between the Fourth, Eighth, and Eleventh Circuits, and the Tenth and Fifth Circuits, Brief in opposition at 21, does not undercut the analysis in Texaco's petition for certiorari: there is an important conflict over whether limited post-trial review of punitive damages awards under the traditional "shock the conscience" standard satisfies the due process principles announced in *Haslip*.

Mason is in error in stating that the Eighth Circuit has cited with approval the Fifth Circuit's decision in

Eichenseer v. Reserve Life Insurance Co., 934 F.2d 1377 (5th Cir. 1991). Brief in opposition at 21. The Eighth Circuit decided *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), before the Fifth Circuit decided *Eichenseer* on remand from this Court, so obviously the Eighth Circuit did not cite that decision with approval or otherwise. (Mason asserts that the Eighth Circuit "has affirmed the jury award in *Robertson Oil*," Brief in opposition at 21, which is also incorrect. The Eighth Circuit remanded to the district court for reconsideration in light of *Haslip*, and the district court's decision, reported at 779 F.Supp. 994 (W.D. Ark. 1991), is now on appeal.)

3. Mason repeatedly suggests that Texaco advocates the adoption of federal common law to displace Kansas law on punitive damages. Brief in opposition at 6, 8, 11, 15. This suggestion is incorrect. Instead, Texaco's position is that this case shows, in a dramatic fashion, the need for this Court to examine the intersection of federal procedural law, the Seventh Amendment, and the Due Process Clause in the context of review of punitive damages verdicts in diversity cases.

4. In seeking to justify the striking inconsistency between the first and second jury verdicts, Mason asserts that "[t]here was no substantial similarity in the evidence presented at the first and second trial." Brief in opposition at 4, 8. This is incorrect. Plaintiff's witnesses at the second trial had all testified at the first trial. For its part, Texaco called three witnesses who had not testified at the first trial, but none of these new witnesses testified about Texaco's conduct. (One testified about the Coast Guard's failure to follow its own precautions, one testified about whose benzene was sold to the Coast Guard, and the last testified about toxicology.) The same detailed pretrial order governed both trials. The punitive damages instruction to the jury was the same in both trials. The evidence at the two trials that could be relevant to punitive damages was essentially identical.

5. Mason does not address her failure to cross-appeal from the denial of her motion for a new trial after the first jury rejected her claim for punitive damages. Instead, Mason focuses on the nature of the remand from *Mason I*, but she repeatedly misstates the judgment of the Tenth Circuit by stating that the remand was for "a new trial on all 'fact-bound' issues without limitation." Brief in opposition at 26, 4. To the contrary, the Tenth Circuit in *Mason I* did not mention punitive damages and the "fact-bound" issues it remanded for trial were limited to issues specifically raised by Texaco. Its mandate was as follows: "The judgment *against Texaco* is reversed and the case is REMANDED for a new trial." App. 148a; 862 F.2d at 250 (emphasis added).

Mason relies on *Hutchison v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992), for the proposition that punitive damages must be included in any new trial, because liability for compensatory damages cannot be tried by itself. Brief in opposition at 29 n.8. *Stuckey* stands for no such proposition. There the district court had ordered a new trial on the ground that the compensatory and punitive damages awarded by the jury were excessive, and the D.C. Circuit affirmed. (Thus *Stuckey* differs from this case in the critical respect that the first jury in this case declined to award any punitive damages.) The D.C. Circuit, citing *Haslip*, noted that the "jury should be permitted to consider the amount of actual damages in calculating a punitive damage award," 952 F.2d at 1422, and therefore the amount of punitive damages would have to be resubmitted to the jury in the new trial.

Respectfully submitted,

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